STATE OF MICHIGAN

COURT OF APPEALS

CARLOS PRIESKORN,

Plaintiff-Appellant/Cross-Appellee,

v

UNIVERSITY OF MICHIGAN HEALTH SYSTEM, a/k/a UNIVERSITY OF MICHIGAN HOSPITAL, BERNARD NOEYACK, JR., and DIANE REMBERT,

Defendants-Appellees/Cross-Appellants,

and

RESHUNDA TRIPPLET and MADIA BRYANT-JOHNSON,

Defendants-Appellees.

UNPUBLISHED
January 24, 2012

No. 298996
Washtenaw Circuit Court
LC No. 08-000987-CZ

Before: SHAPIRO, P.J., and SAAD and BECKERING, JJ.

PER CURIAM.

Plaintiff Carlos Prieskorn appeals as of right the trial court's order summarily dismissing his claim under the Whistleblowers' Protection Act ("WPA"), MCL 15.361 *et seq.*[1] We affirm.

Plaintiff was terminated during the six-month probationary period of his employment as a part-time phlebotomist with defendant University of Michigan Health System. Plaintiff contends that he was fired because he made numerous reports of patient-safety violations, time-card fraud, and other performance issues to his superiors. Defendant contends that it terminated plaintiff for the reasons set forth in its July 11, 2008, termination letter:

[1] Plaintiff does not challenge the trial court's dismissal of his claim for intentional infliction of emotional distress or its dismissal of defendants Reshunda Tripplet and Madia Bryant-Johnson, who were his co-workers.

> At this time, the department of pathology will be terminating your position at the University of Michigan. During your six month probationary period, which began on 03/10/08 and ending in September, it has been documented that you have on two occasions given the impression that you were acting on the orders of a supervisor. One of the occasions you informed an employee that she did not have to work and then worked those hours yourself. This type of behavior is unacceptable in the health care field. It was stated that you tape recorded the conversation of another staff member without them being aware of that and without your involvement in that conversation. This is also an unacceptable action and cannot be tolerated.

Plaintiff argues that the trial court erroneously granted summary disposition because a genuine issue of material fact existed with regard to whether there was a causal connection between the protected activity of reporting safety violations and plaintiff's termination from his employment. Moreover, plaintiff argues that a genuine issue of material fact exists with regard to whether the proffered reasons for discharge were a pretext for discrimination. We disagree in both regards.

We review de novo a trial court's decision to grant summary disposition. *Coblentz v Novi*, 475 Mich 558, 567; 719 NW2d 73 (2006). Consequently, we review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins Co*, 458 Mich 288, 294; 582 NW2d 776 (1998). The trial court granted defendants summary disposition pursuant to MCR 2.116(C)(10). A motion under MCR 2.116(C)(10) tests the factual sufficiency of the complaint. *Maiden v Rozwood*, 461 Mich 109, 120; 597 NW2d 817 (1999). "In evaluating a motion for summary disposition brought under this subsection, a [reviewing] court considers affidavits, pleadings, depositions, admissions, and other evidence submitted by the parties, MCR 2.116(G)(5), in the light most favorable to the party opposing the motion." *Id.* Where the proffered evidence fails to establish a genuine issue of material fact, the moving party is entitled to judgment as a matter of law. MCR 2.116(C)(10); MCR 2.116(G)(4); *Coblentz*, 475 Mich at 568.

"Whether a plaintiff has established a prima facie case under the WPA is a question of law subject to review de novo." *Manzo v Petrella*, 261 Mich App 705, 711; 683 NW2d 699 (2004). To establish a prima facie case under the WPA, "a plaintiff must show that (1) the plaintiff was engaged in protected activity as defined by the act, (2) the plaintiff was discharged or discriminated against, and (3) a causal connection exists between the protected activity and the discharge or adverse employment action." *West v Gen Motors Corp*, 469 Mich 177, 183-184; 665 NW2d 468 (2003). Plaintiff has the initial burden of establishing his prima facie case by a preponderance of the evidence. *Phinney v Perlmutter*, 222 Mich App 513, 563; 564 NW2d 532 (1997).

In *Shaw v Ecorse*, 283 Mich App 1, 14-15; 770 NW2d 31 (2009), we addressed the distinction between direct evidence and circumstantial evidence in the context of causal connection as follows:

> Direct evidence is that which, if believed, requires the conclusion that the plaintiff's protected activity was at least a motivating factor in the employer's actions. To establish causation using circumstantial evidence, the "circumstantial proof must facilitate reasonable inferences of causation, not mere speculation." Speculation or mere conjecture "is simply an explanation consistent with known facts or conditions, but not deducible from them as a reasonable inference." In other words, the evidence presented will be sufficient to create a triable issue of fact if the jury could reasonably infer from the evidence that the employer's actions were motivated by retaliation. [Citations omitted.]

This Court offered additional guidance in *Taylor v Modern Engineering, Inc*, 252 Mich App 655, 659; 653 NW2d 625 (2002):

> When considering claims under the WPA, we apply the burden-shifting analysis used in retaliatory discharge claims under the Civil Rights Act, MCL 37.2101 *et seq*. If the plaintiff has successfully proved a prima facie case under the WPA, the burden shifts to the defendant to articulate a legitimate business reason for the plaintiff's discharge. If the defendant produces evidence establishing the existence of a legitimate reason for the discharge, the plaintiff then has the opportunity to prove that the legitimate reason offered by the defendant was not the true reason, but was only a pretext for the discharge. [Citations omitted.]

We conclude that plaintiff did not meet his burden of showing that a causal connection existed between the protected activity and his discharge. *West*, 469 Mich at 183-184. Here, there is no direct evidence of discrimination because there was no evidence presented "which, if believed, requires the conclusion that plaintiff's protected activity was at least a motivating factor in the employer's actions." *Shaw*, 283 Mich App at 14. In addition, there is no circumstantial proof that facilitates reasonable inferences of causation. *Id*. at 14-15. Instead, plaintiff offered only speculation or mere conjecture in support of his claim. *Id.* The documentary evidence supplied by the parties established that plaintiff's reporting of purported safety violations preceded his firing. Plaintiff's assertion that his employment was terminated because he reported these purported violations is one possible explanation for his termination that is consistent with the temporal relationship between the acts of reporting and the act of termination. Importantly, however, the mere coincidental temporal relationship between the acts alone is insufficient to create a reasonable inference that the termination was motivated by retaliation for the reporting of purported safety violations. *West*, 469 Mich at 186.

Moreover, defendant Bernard Noeyack, Jr., the head of the phlebotomist department; Beverly Smith, the human resource liaison for the department of pathology; and Harry Neusius, Noeyack's supervisor, unequivocally testified that plaintiff was terminated for the reasons outlined in the termination letter, not for his reports of safety violations. Indeed, plaintiff testified that Noeyack was tired of plaintiff complaining in general and that it was the frequency,

not the subject matter of the complaints, that irritated Noeyack.[2] Accordingly, there is no testimony in the record that plaintiff was terminated in retaliation for reporting patient-safety

[2] Plaintiff testified in pertinent part as follows:

> *Q* [Defense counsel]. . . . . When is the first time that you saw Mr. Noeyack use body language that you interpreted as indicating he did not want to hear from you regarding patient safety concerns?
>
> *A.* It wasn't necessarily regarding patient safety concerns. He just didn't want to hear complaints from me about Diane[,] Madia[,] or Reshunda.
>
> *Q.* Did he ever use body language that you interpreted as being unwilling to listen to your concerns regarding patient safety?
>
> *A.* Again, when I started to make the patient safety violations, he was already irritated enough to where he didn't want me to complain at all.
>
> *Q.* And when did it occur that you interpreted his body language as meaning he didn't want to hear anything even regarding patient safety?
>
> *A.* I would say probably a good four weeks before [plaintiff's June 20th e-mail].
>
> * * *
>
> *Q.* So four weeks before June 20th, you thought Mr. Noeyack did not want to hear anything more about patient safety?
>
> *A.* No, you misunderstood me. He did not want to hear me complaining in general about Diane, Madia, or Reshunda. It did not matter what the situation was. It could be them coming in and doing time card fraud, it could be a patient safety violation, it could be anything such as physical altercations where Diane and Lori were throwing pagers on tables at each other in the room, he didn't want to hear about it because I had complained enough.
>
> *Q.* And some of those complaints had nothing to do with patient safety, correct?
>
> *A.* Correct, but at the time I had started to report the patient safety violations, he did not care about them because it was just another complaint in his mind.

Plaintiff subsequently reiterated:

violations. Rather, there is abundant evidence in the record demonstrating that plaintiff was terminated for the conduct outlined in the termination letter. Hence, although plaintiff was terminated after he reported safety violations and received a good employee evaluation, plaintiff being terminated as retaliation was not deducible from facts as a reasonable inference. *Id.*; *Shaw*, 283 Mich App at 14-15. The evidence presented in this case does not create a triable issue of fact because a jury could not "reasonably infer from the evidence that the employer's actions were motivated by retaliation." *Shaw*, 283 Mich App at 15. Plaintiff did not meet his burden of showing that a causal connection existed between the protected activity and his discharge. *West*, 469 Mich at 183-184. Thus, plaintiff did not meet his burden of establishing a prima facie case. *Id*.

Plaintiff also argues that summary disposition was inappropriate in this case because the trial court weighed credibility and made a finding of fact when it ruled that Noeyack believed defendant Diane Rembert's allegations about plaintiff. Plaintiff correctly observes that the trial "'court may not make factual findings or weigh credibility,'" *Nesbitt v American Community Mut Ins Co*, 236 Mich App 215, 225; 600 NW2d 427 (1999), or resolve factual disputes when considering a summary disposition motion, *Burkhardt v Bailey*, 260 Mich App 636, 647; 680 NW2d 453 (2004). However, our review of the record reveals that the court made no such determinations. Rather, the court merely observed that "[i]t is uncontested, as far as I can see from any of the evidence that's on Record in this case, is that Noeyack believed the allegations to be true." This observation is supported by the uncontested record evidence.

Plaintiff next argues that summary disposition was prematurely granted because he did not yet depose Rembert and Rembert's deposition would have yielded evidentiary support for plaintiff's case. We disagree. "If a party opposes a motion for summary disposition on the ground that discovery is incomplete, the party must at least assert that a dispute does indeed exist and support that allegation by some independent evidence." *Bellows v Delaware McDonald's Corp*, 206 Mich App 555, 561; 522 NW2d 707 (1994). Plaintiff has not done so. In other words, plaintiff has not demonstrated that the deposing of Rembert "stands a fair chance of uncovering factual support for" plaintiff's position. *Marilyn Froling Revocable Living Trust v Bloomfield Hills Country Club*, 283 Mich App 264, 292; 769 NW2d 234 (2009). Summary disposition was not prematurely granted.

Accordingly, the trial court correctly determined that defendants were entitled to summary disposition as a matter of law on plaintiff's WPA claim. *Coblentz*, 475 Mich at 567-568; *Manzo*, 261 Mich App at 711.

> My interpretation every time I had a complaint with him was he didn't want to hear about it no matter what the complaint was about, whether it was patient safety violation, whether it was standard operating procedures for the department, he just acted like I was being a nuisance and in my impression, if there was nobody there to report it then there really isn't a problem.

Given our determination that summary disposition was correctly granted, we need not address plaintiff's remaining issue or defendants' issues on cross-appeal.

Affirmed.

/s/ Henry William Saad
/s/ Jane M. Beckering